IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION

SUIT NO.1628 OF 1998

BOI Shareholding Ltd.
a company incorporated under the provisions
of the Companies Act 1956
having its Registered Office
at Stock Exchange,
Rotunda Building, Gr. floor,
Ambalal Doshi Marg, Fort, Mumbai-400001.

....Plaintiffs.

Vs.

1. Reghunath P. Behara of Bombay,
   Indian Inhabitant,
   Residing at Flat No.11,
   B Wing, Bldg. No.26,
   Govind Nagar, Borivali (W),
   Bombay-400092.

2. Prakash R. Pathariye of Bombay,
   Indian Inhabitant, carrying on
   business in the name and style
   of M/s. Prakash Consultants as sole
   Prop. thereof at 101, Mangesh Prasad.
   Datta Mandir Road, Santacruz(E),
   Bombay 400 055.

....Defendants.

Mr.S.A.Ahmed i/by M/s.Thakkar and Bali for the plaintiffs.

CORAM: A.S. OKA, J.
DATE : August 10, 2007

ORAL JUDGMENT :

1. This suit is listed under the caption of "Undefended Suits for Exparte Decree". The learned counsel for the plaintiffs has tendered on record an affidavit of evidence of Shri.Sanjay M. Phadke who is the Company Secretary of the plaintiffs. The said affidavit is

marked "X" for identification and is taken on record. He has also tendered three documents alongwith the compilation. The compilation is taken on record and marked "Y" for identification.

2. The plaintiffs are a joint venture enterprise of Bank of India and the Stock Exchange, Mumbai. The plaintiffs are managing the clearing house of the Stock Exchange, Mumbai. The 1st defendant was appointed and was working as an Executive Assistant Cum Data Entry Operator with the plaintiffs. In the regular course of their business the plaintiffs received Share Certificates from the various stock brokers at the time of settlement. The said Share Certificates kept in folders are thereafter handed over to the respective purchasing brokers in the usual course of business.

3. On or about 21st November, 1994 in the A Group Settlement No.17/940-95 M/s. B.D.Shroff Broker No.63 delivered a folder containing 850 shares of Reliance Industries Ltd. The said folder was delivered on or about 24th November,1994 to the Stock Exchange Clearing House. The receiving Brokers M/s. Shashikant M. Damani who collected the said folder on 25th November,1994 reported to the Clearing House officials on the same day that they found 550-shares out of the total 850 were missing from the said folder. The

Registrar of Reliance Industries Ltd. furnished xerox copies of the share transfer forms dated 1st December,1994 in respect of 50 shares out of the total 550 stolen shares showing transfer in the name of Mrs. Usha P. Pathariya wife of the 2nd defendant. The plaintiffs have stated that on being confronted with the said fact, the 2nd defendant and his wife stated that the said shares were received by them from the 1st defendant and that he had paid value of the same to the first defendant at the rate of Rs.376.25 per share. According to the plaintiffs, he also disclosed that earlier, the 1st defendant had sold him shares of certain other companies which were found lost during the settlement. According to the case of the plaintiffs by his letter dated 4th April,1995 the 2nd defendant admitted the entire transaction and also admitted his liability to pay the amount.

4. The case made out in the plaint is that the defendants while acting in furtherance of their common intention and conspiracy committed theft of the aforesaid shares being valuable securities and while doing so they have caused loss and injury to the plaintiffs for which they are bound to compensate the plaintiffs.

5. It is stated that as the shares were lost on account

of misfeasance of the employee of the plaintiffs, the plaintiffs had to purchase 550 shares of M/s. Reliance Industries Ltd. in auction in the open market for the total price of Rs.1,64,050/- with interest on the said amount till the date of the suit at the rate of 18% per annum.

6. In the affidavit of evidence, the Company Secretary of the plaintiffs stated that at the material times the 1st defendant was in such a position where he had physical access to the folders of the Share Certificates handed over to the plaintiffs from time to time. In the affidavit he has stated that by letter dated 4th April,1995 the second defendant admitted the entire transaction and also admitted his liability to pay the requisite amount. It is stated that as the original letter is lost or misplaced and could not be found, a zerox copy of the said letter is produced alongwith the compilation.

7. The submission of the learned counsel for the plaintiffs is that the 1st defendant took 550 shares from the folder and sold the same to the wife of the 2nd defendant as evidenced by a zerox copy of the said letter dated 4th April,1995. He stated that as the original of the letter dated 4th April,1995 has been misplaced, the secondary evidence has been led by filing

zerox copy thereof. He pointed out that the 2nd defendant has admitted that he has taken 550 shares from the first defendant and has sold 500-shares out of the 550 and balance 50-shares stand in the name of his wife. He pointed out that the 2nd defendant has stated that he was ready to purchase 550 shares of Reliance Industries Ltd. and hand over the same to the plaintiffs. He therefore, submitted that the 2nd defendant has accepted the liability.

8. I have considered the submissions. The fact that the 1st defendant was working as an Executive Assistant Cum Data Entry Operator with the plaintiffs has been proved by affidavit of the Secretary of the plaintiffs. It is also proved by the said affidavit that the 1st defendant was in a position where he had physical access to the folders of the Share Certificates handed over to the plaintiffs from time to time. A case is made out by the plaintiffs that 550 shares out of 850 were missing from the folder delivered by M/s. B.D.Shroff Borker No.63 on 24th November,1994 has been also proved by the affidavit of the Secretary. Thus, the liability of the first defendant who was the employee of the plaintiffs is established in the sense that it can be stated that the 1st defendant was instrumental for loss of 550 shares.

9. In so far as 2nd defendant is concerned, the plaintiffs are trying to lead secondary evidence of letter dated 4th April,1995 by producing zerox copy thereof. No material has been produced on record to show that the said letter dated 4th April,1994 was handed over by the 2nd defendant to the plaintiffs. The said letter is in fact addressed to Clearing House, Dalal Street, Bombay. It is alleged in the plaint that when the 2nd defendant was confronted with the zerox copies of the share transfer forms, he accepted everything and gave the said letter. The plaintiffs have not filed affidavit of the person who confronted the 2nd defendant and who obtained the said letter from the 2nd defendant. The plaintiffs have not established that they had received any such letter dated 4th April,1995. It must be stated here that the plaintiffs had not produced a copy of the said letter alongwith the plaint. In absence of any specific evidence that the said letter was received by the plaintiffs from the second defendant, the plaintiffs cannot be permitted to lead secondary evidence of the said letter by contending that the original has been misplaced by the plaintiffs. The claim of the plaintiffs against the 2nd defendant is based only on the said letter. Therefore, the plaintiffs have not established the case as against the 2nd defendant.

10. However, the plaintiff must succeed as against the 1st defendant. Hence, I pass the following order.

ORDER

1. The suit stands dismissed as against the 2nd defendant.

2. The suit is decreed in terms of prayer clause (a) and (b) as against the 1st defendant.

3. The plaintiffs will be entitled to refund of court fees, if any, as per rules.

4. Certified copy is expedited.

(A.S. OKA, J.)